

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RONALD P. PASSATEMPO, Trustee of the Samuel
Pietropaolo Irrevocable Trust, *et al.*,

Plaintiffs,

V.

FREDERICK V. MCMENIMEN III, *et al.*,

Defendants.

Case No. 05-CV-10118-GAO

**DEFENDANT FREDERICK V. McMENIMEN III'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Pursuant to Rules 12(b)(5) and 12(b)(6) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78a-4(b)(2), defendant Frederick V. McMenimen, III respectfully requests that the Court dismiss all claims asserted against him in the captioned action.

In support of this motion, the movant states:

1. Despite having no “good cause” for such a failure, the plaintiffs neglected to serve the movant with the operative pleading within 90 days after it was filed, thus violating Mass. R. Civ. P. 4(j);
2. All of the claims against the movant were time-barred at the time the action was first filed or, in the case of breach of contract allegations, are now beyond the operative statute of limitations;
3. To the extent they survive the more universal challenges, several of the plaintiffs’ theories are fatally flawed for various substantive reasons; and
4. The claim arising under Section 10(b) of the Securities Act of 1934 does not allege scienter with adequate particularity.

In further support of this motion, the movant submits the memorandum filed herewith.

WHEREFORE, defendant Frederick V. McMenimen, III respectfully requests that this motion be granted.

Respectfully submitted,

FREDERICK V. McMENIMEN, III

By his attorney,

/S/

William P. Corbett, Jr. (BBO #561201)
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Dated: February 16, 2005

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), the movant states that he believes oral argument may assist the Court, and he thus wishes to be heard on this motion.

LOCAL RULE 7.1(A)(2) CERTIFICATE

I hereby certify that before filing this motion, I conferred by e-mail and telephone with David M. Burkoff, Esquire, attorney for the plaintiffs, in a good faith effort to resolve or narrow the issues presented.

/S/

William P. Corbett, Jr.